(D) 83 - 1853

No.....

In The

Supreme Court of the United States

October Term, 1983

—o—

PAT ERICKSON, KIMBERLY LA DEUR, JOETTE M. HAGER, and KIMBERLY S. KOLZE,

Petitioners,

vs.

BOARD OF EDUCATION, PROVISO TOWNSHIP HIGH SCHOOL, DISTRICT NO. 209, COOK COUNTY, ILLINOIS,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

—o—

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QUESTIONS PRESENTED

1. Whether The Equal Pay Act is violated by paying female high school coaches of female athletes substantially less than male high school coaches of male athletes, where both male and female coaches have similar duties and responsibilities.

2. Whether defenses to Title VII of the Federal Civil Rights Act of 1964 (42 U.S.C. 2000e) are a bar to recovery under the Equal Pay Act.

TABLE OF CONTENTS

APPENDIX CONTENTS

TABLE OF CITATIONS

CASES

TREATISES

No.....

In The

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PAT ERICKSON, KIMBERLY LA DEUR, JOETTE M. HAGER, and KIMBERLY S. KOLZE,

Petitioners,

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BOARD OF EDUCATION, PROVISO TOWNSHIP HIGH SCHOOL, DISTRICT NO. 209, COOK COUNTY, ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

Petitioners pray that a Writ of Certiorari issue to review the decision of the Illinois Appellate Court for the First District, rendered December 12, 1983, and the denial of the petition for leave to appeal entered by the Illinois Supreme Court entered on April 3, 1984.

OPINIONS BELOW

The order of the Illinois Supreme Court denying a petition for leave to appeal, entered April 3, 1984, is reprinted in full as Appendix C to this Petition.

The opinion of the Illinois Appellate Court, First District is reported at 120 Ill.App.3d 264, 75 Ill.Dec. 916, 458 N.E.2d 84 and is reprinted in full as Appendix B to this Petition.

The final judgment order of the trial court is reported in full as Appendix A to this Petition.

o

JURISDICTION

Jurisdiction is based on 28 U.S.C. §1257(3). The order sought to be reviewed was entered April 3, 1984.

o

STATUTES INVOLVED

The Equal Pay Act, 29 U.S.C. §206(d)(1)

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and re-

sponsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of productions; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

The Federal Civil Rights Act of 1964,

42 U.S.C. §2000(e) *et seq.*

CONSTITUTIONAL PROVISIONS

U.S. CONST., Amend. XIV §1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

During the period of August, 1977 through October, 1979, Petitioners, Pat Erickson, Kimberly La Deur, Joette M. Hager and Kimberly S. Kolze, were employed by the Respondent, Board of Education, Proviso Township High

School, District No. 209, Cook County, Illinois, as athletic coaches in a secondary school. Petitioners' duties, while so employed, consisted of recruiting teams, supervision and instruction of practices, travel, attendance at team games, supervision, accounting for equipment and uniforms, and arrangement of schedules fo practice, play, and transportation.

During the period of August, 1977 through October, 1979, Respondent paid Petitioners at a rate less than Respondent paid to athletic coaches of the male sex, although the jobs performed by Petitioners required equal skill, effort and responsibility and were performed under similar working conditions. Coaches for both the boys' and girls' teams practiced approximately the same number of hours per day and days per week. Both teams had approximately the same number of meets per season, and both had approximately the same number of road games and the same number of team members.

The difference in rates paid to male athletic coaches was not a part of, and was not occasioned by, any seniority, merit, or piecework system, but was based solely on the factor of sex. Accordingly, Petitioner, Pat Erickson, brought the aforesaid discriminatory practices to the attention of Respondent at a formal meeting of its board prior to the institution of this litigation. Despite efforts on the part of Petitioners, Respondent, with full knowledge and notice of the aforesaid discriminatory practice, continued to act in the aforesaid manner.

On October 3, 1980, Petitioners filed suit against the Respondent in the Circuit Court of Cook County, Illinois alleging vioations of The Equal Pay Act, as well as viola-

tions of the Illinois State Constitution. Respondent filed an Answer denying liability and a motion for summary judgment, which motion was granted by the trial court.

The Illinois Appellate Court opinion, while recognizing the applicability of the Equal Pay Act, misapplied cases involving Title VII of the Federal Civil Rights Act of 1964 ("Title VII") and held that the Petitioners were not discriminated against because of their sex as a matter of law, finding that "the compensation to be given to athletic coaches did not vary with any particular coach but depended upon, and varied in accordance with, the sex of the pupils who received the coaching." (458 N.E.2d at 86) The Illinois Appellate Court further concluded "in the instant case, the plaintiffs herein have in fact received equal pay for the same coaching responsibilities and services. Thus any differential between male and female coaches is based upon a factor 'other than sex' precisely as stated in exception (iv) of the Equal Pay Act. 29 U.S.C. 206(d)(1)(iv)." 458 N.E.2d at 87.

The Petitioners' petition for leave to appeal to the Illinois Supreme Court was denied.

REASONS FOR GRANTING THE WRIT

Introduction

The Illinois Appellate Court correctly found that the Equal Pay Act is applicable to the instant situation. It is also undisputed, that in the Respondent's school district, the coaches of female athletes, although having similar

duties and responsibilities, are paid substantially less than the coaches of male athletes. The record further indicates that male athletes are generally coached by men and female athletes are generally coached by women.

This case therefore raises squarely the issue of whether Respondent has not violated The Equal Pay Act as a matter of law, based solely on the fact that on occasion men coached female athletes and were paid the lower salary rate usually paid to female coaches, and that women occasionally coached male athletes and were paid the higher salary rate usually paid to male coaches. This Court has clearly indicated that isolated instances of token equality in pay are insufficient to excuse a general pattern of non-compliance with the Equal Pay Act, and that such an interpretation of the Act would frustrate the purpose of Congress by readily allowing employers, such as Respondent herein, a vehicle of evading their legal responsibility by token job placement, notwithstanding generally discriminatory employment practices.

The Illinois Appellate Court opinion further confuses two separate and distinct federal statutory provisions, by applying cases decided under Title VII to bar recovery under Petitioners' claim pursuant to The Equal Pay Act. The decision of the Illinois Appellate Court presently stands as an erroneous state court interpretation of two federal statutes, which, unless reversed, will allow the Illinois Appellate Court to effectively repeal The Equal Pay Act.

I.

Whether the Equal Pay Act is violated by paying female high school coaches of female athletes substantially less than male high school coaches of male athletes, where both male and female coaches have similar duties and responsibilities.

The Equal Pay Act 29 U.S.C. 206(d)(1) provides:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

The Illinois Appellate Court held that the Equal Pay Act applied to Petitioners, but that "as a factual matter, . . . the plaintiffs were not discriminated against because of their sex." 458 N.E.2d at 86.

The leading case interpreting the Equal Pay Act is *Corning Glass Works v. Brennan,* 417 U.S. 188 (1974). The employer in *Corning* argued that a salary differential for night shift of employees totally composed of men was a justified exception to the Act based upon the language therein referring to pay differentials "based on any other factor other than sex". In rejecting this con-

cept, this Court discussed the underlying purposes of the Act and stated at p. 206 of its opinion:

> "As the Second Circuit noted, Congress enacted the Equal Pay Act '[r]ecognizing the weaker bargaining position of many women and believing that discrimination in wage rates represented unfair employer exploitation of this source of cheap labor' 474 F.2d, at 234. In response to evidence of the many families dependent on the income of working women, Congress included in the Act's statement of purpose a finding that 'the existence . . . of wage differentials based on sex . . . depresses wages and living standards for employees necessary for their health and efficiency' (citation omitted). And Congress declared it to be the policy of the Act to correct this condition. (citation omitted).
>
> To achieve this end, Congress required that employers pay equal pay for equal work and then specified: '*Provided*, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee', 29 U.S.C. Section 206(d)(1)." (Emphasis theirs).

In the instant case it is undisputed that there is a vast disparity of salary between the pay received by the male coaches and that received by the female coaches. For example, during the 1976-78 school years the boys' varsity gymnastics coach received $1,040 for his coaching duties, while the girls' varsity gymnastics coach received only $500. The Pay Schedule for Athletic Coaches, from which this information was obtained, is attached to the within Petition as Appendix D. Under the respective headings "Men Coaches" and "Women Coaches", as set forth therein, substantially higher rates of pay are provided for all "Men Coaches" than the rates paid to all

"Women Coaches". In most cases payment to male coaches is almost twice as much as that paid to female coaches. Yet the Illinois Appellate Court unexplicably concluded "the plaintiffs herein have in fact received equal pay for the same coaching responsibilities and services." 458 N.E. 2d at 87.

The Illinois Appellate Court concluded from the pleadings and discovery that:

> "the coaching itself was such that in some instances male coaches assisted girls in their sports and in one situation a woman had served as a coach of a gymnastics team for boys. Thus the compensation for the coaching was not set in accordance with the sex of the coach but rather pertained to the sex of the participants who received the coaching." 458 N.E.2d at 85.

Petitioners submit that a violation of the Equal Pay Act may not be evaded merely by the employer demonstrating that a few women were treated favorably and that a few men were treated unfavorably, notwithstanding an overall policy which is generally discriminatory. In the case of *Hodgson v. American Bank of Commerce,* 447 F. 2d 416, 421 (C.A.5-1971), involving a suit by female employees of a bank who contended that there was a discriminatory salary differential between the wages of men and women, the court, in response to arguments by the bank that the claimants were precluded from recovery because some women were, in fact, making more money than some men, stated:

> "The District Court found that the Bank must have been motivated by factors other than sex because two women were making more than men during the two periods in issue. In other words, the district court

> considered this factor to indicate that there was no differential between the wages of men as a group and women as a group during the period. . . .
>
> The Secretary contends that under the district court's reasoning an employer could consistently hire women at a lower starting rate and be protected by the fact that some women, after long periods of service, ultimately reached higher salary levels than men subsequently hired. This, it is contended, would cripple the administration of the Act by offering an easy method of evasion. The mere presence of a few women in the upper part of the wage scale would permit widespread discrimination against women as a group. This could result automatically through general periodical increments added tc a discriminatory starting salary, or deliberately through the selection of a few women for favorable treatment or a few men for unfavorable treatment—the result of which would be to give protective coloration to a generally discriminatory pattern. It is enough to say that we agree."

Similarly, in *Corning Glass Works v. Brennan, supra,* the issue before this Court was whether an employer violated the Equal Pay Act by paying a higher base wage to male night shift inspectors than it paid the female inspectors performing the same tasks on the day shift, where the higher rate was paid in addition to a separate night shift differential paid to all employees for night wc k. As in the instant case, the employer in *Corning* sought to convince the Court that discrimination was based on a factor other than sex. The employer argued that until the implementation of the Equal Pay Act, the higher rate paid for night inspection work performed solely by men was, in fact, intended to serve as compensation for night work rather than as added payment based upon

sex. Unlike in the instant case, there was a full trial on the factual questions at issue, and this Court, in affirming the decision of the trial court, held that the employer had failed to sustain its burden of proof in demonstrating that the discrimination was based upon factors other than sex.

As stated at pp. 205-208 of the Court's opinion:

"... The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work."

. . . . . .

"By proving that after the effective date of the Equal Pay Act, Corning paid female day inspectors less than male night inspectors for equal work, the Secretary implicitly demonstrated that the wages of female day shift inspectors were unlawfully depressed, and that the fair wage for inspection work was the base wage paid to male inspectors on the night shift."

. . . . . .

"The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve. If, as the Secretary proved, the work performed by women on the day shift was equal to that performed by men on the night shift, the company became obligated to pay the women the same basic wage as their male counterparts on the effective date of the Act. To permit the company to escape that obligation by agreeing to allow some women to work on the night

shift at a higher rate of pay as vacancies occurred would frustrate, not serve, Congress' ends." (Citation omitted).

Similarly, in the instant case, since the work performed by women in coaching female athletes is equal to that performed by men in coaching male athletes, the Respondent is legally obligated to pay the female coaches the same wage as their male counterparts. To permit the Respondent to escape that obligation, by occasionally allowing some women to coach male athletes at a higher rate of pay, would equally frustrate and not serve congressional ends.

As recently stated in the recent case of *Grumbine v. United States,* — F.Supp. — (U.S.D.C. - D.C. - April 3, 1984) 82-1938 at p. 12:

> ". . . As a remedial statute, the Equal Pay Act must, of course, be liberally construed. *Peyton v. Rowe,* 391 U.S. 54 (1968). The Supreme Court's admonition in *Phillips Co. v. Walling,* 324 U.S. 490 (1945) is apt:
>
> > 'The Fair Labor Standards Act was designed "to extend the frontiers of social progress" by "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." Message of the President to Congress, May 24, 1934. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.'
> >
> > (Footnote to foregoing citation:
> >
> > '324 U.S. at 493. While the *Walling* decision directy concerned the wage and hour provisions of

> the Fair Labor Standards Act, the court in [*Brennan v. Goose Creek Consolidated Independent School District*, 591 F.2d 53 (5th Cir. 1975)] regarded the quoted language as directly relevant to the sex discrimination provisions of the Act.'")

In the instant case the sufficiency of Petitioners' Complaint is not at issue, Respondent having answered same. Accordingly, unless Respondent can meet its burden of establishing an affirmative defense to prima facie violations of the statute by establishing that its conduct falls within one of the enumerated exceptions to the Act, it must be held to have violated same. Tokenism in Respondent's employment policy, relied upon by the Illinois Appellate Court, does not fall into any one of said exceptions, and as such Respondent has failed to establish such an affirmative defense to Petitioners' prima facie case.

II.

Whether defenses to Title VII of the Federal Civil Rights Act of 1964 (42 U.S.C. 2000e) are a bar to recovery under the Equal Pay Act.

The Illinois Appellate Court simply concluded that since all coaches of boys were paid the same, while all coaches of girls were paid the same, there was no pay differential based on sex between the salaries received by male and female coaches. This conclusion totally ignores the issue of tokenism in the general employment pattern, whereby Respondent, with few exceptions, only hired women to coach girls and men to coach boys, and resulted from a misapplication of cases involving Title VII to the case at bar.

The Illinois Appellate Court relied upon a number of discrimination cases, none of which involved interpretations of the Equal Pay Act. *Kenneweg v. Hampton Township School District,* 438 F.Supp. 575 (W.D.Pa. - 1977); and *Jackson and Pollick v. Armstrong School Dist.,* 430 F. Supp. 1050 (W.D.Pa. 1977), both involve alleged vications of Title VII, 42 U.S.C. §2000e-2(h) and have nothing to do with The Equal Pay Act. Although conceding in its opinion that the instant case is not a Title VII case, the Illinois Appellate Court nevertheless rejected substantial authority discrediting the application of Title VII criteria to Equal Pay Act cases, and based its opinion on interpretations of Title VII. An extensive discussion of the differences between various types of sex discrimination actions, and particularly Title VII and Equal Pay Act cases, can be found in Dessem, "Sex Discrimination in Coaching" 3 *Harvard Women's L.J.* 97, (Spring 1980), wherein the author, an attorney for the United States Department of Justice concluded:

> "The Equal Pay Act of 1963 presents few of the problems inherent in the use of Title VII . . . to challenge sexual disparate coaching salaries, and, perhaps as a result, it has proven to be the most effective legal weapon against a disparate payment of the coaches of boys' and girls' athletic teams.
>
> The Equal Pay Act prohibits discrimination:
>
> > between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, . . .

> In determining the applicability of the Equal Pay Act, the focus is upon the jobs occupied by the relevant male and female employees. . . .
>
> . . . Furthermore, '[a]pplication of the equal pay standard is not dependent on job classifications or titles but depends rather on actual job requirements and performance.'
>
> In adjudging a local school district in violation of the Equal Pay Act, one federal district court has found the job of girls' softball coach to be substantially equal to that of boys' baseball coach. In comparing the coaching positions, the court considered the nature of the games, the number of payers supervised, the length of practices and playing seasons, the amount of travel required with the teams, and other responsibilities of the coaching jobs. . . . Plaintiffs should be careful to point out, however, that it is the coaching jobs that are being compared rather than the sports coached. *The requirements of the Equal Pay Act are therefore met by proof that the same skill, effort, and responsibility is necessary in coaching the relevant sports at issue and that despite different rules and playing conditions, the coaches are performing substantially equal jobs under similar working conditions.*" (At pp. 107-109) (Emphasis ours)

In distinguishing Title VII cases, the author specifically refers to *Kenneweg, supra,* and *Jackson, supra,* cited by the Illinois Appellate Court in the instant case. As stated at pp. 104-105 of the treatise:

> "It should be noted initially that both *Kenneweg* and *Jackson* were solely Title VII cases and therefore, even if accepted as valid interpretations of Title VII, the reasoning of the cases does not foreclose the contrary result on the different language of Title IX, the Equal Pay Act, or the United States Constitution. Title VII of the Civil Rights Act of 1964 makes it unlawful '. . . to discriminate against any individual be-

> cause of *such individual's* . . . sex' (Emphasis theirs) . . . *The Equal Pay Act's prohibition against discrimination 'between employees on the basis of sex,' on the other hand, focuses on the comparability of particular jobs, and under this provision women coaches should receive equal pay for substantially equal coaching responsibilities whether or not some men also receive less for their coaching.*" (Emphasis ours).

It is undisputed that the particular coaching jobs, performed by Petitioners and male coaches respectively in the Respondent's district, required equal skill, effort, and responsibility, and were performed under similar working conditions. Athletic practices entailed approximately the same number of hours and days per week for all students. Boys' and girls' teams both have approximately the same number of meets, road games, and team members. Assuming, *arguendo,* that Petitioners' recovery would be precluded under Title VII, Petitioners would still be entitled to relief under The Equal Pay Act, inasmuch as women coaches should receive equal pay for substantially equal coaching responsibilities as men, regardless of whether or not the students coached were male or female.

CONCLUSION

Despite decisions of this Court requiring liberal construction of The Equal Pay Act, the Illinois Appellate Court has affirmed the conduct of a local school board which, with few token exceptions, pays women about half the amount as it pays men for the same work. In order to sustain its ruling, the Illinois Appellate Court mis-

applied the provisions of one separate and distinct federal statute to frustrate the intended purpose of another. Petitioner urges the Court to issue its Writ of Certiorari to the Illinois Appellate Court to review its decision in order to clarify whether Title VII of the Civil Rights Act of 1964 should be applied to limit the applicability of The Equal Pay Act. This Court cannot allow an erroneous state court interpretation of two federal statutes, which effectively repeals one of them, to stand.

Respectfully submitted,

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APPENDIX A

NO. 80 L 23362

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

ERICKSON,

v.

BD. OF ED.

ORDER

This cause coming on to be heard on [defendant's] Motion for Summary Judgment, due notice given, and the Court having received the parties' Memoranda, having heard oral argument on 1-27-82 and 4-21-82, and being fully advised in the premises.

It is hereby Ordered:

1. That [defendant's] Motion for Summary Judgment is hereby granted;

2. That this is a final order and there is no just cause to delay enforcement or appeal hereof.

JUDGE MYRON GOMBERG
Apr. 21, 1982

CIRCUIT COURT JUDGE

Name	J. B. MURPHY Attorney for Defendant
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MORGAN M. FINLEY, CLERK OF THE
CIRCUIT COURT OF COOK COUNTY

APPENDIX B

83-0857

PAT ERICKSON, KIMBERLY LA DEUR, JOETTE M. HAGER, and KIMBERLY S. KOLZE,

Plaintiffs-Appellants,

vs.

BOARD OF EDUCATION, PROVISO TOWNSHIP HIGH SCHOOL, DISTRICT NO. 209, COOK COUNTY, ILLINOIS,

Defendant-Appellee.

FIRST DIVISION

(Filed December 12, 1983)

APPEAL from the Circuit Court of Cook County; the Hon. MYRON T. GOMBERG, Judge, presiding

JUSTICE GOLDBERG delivered the opinion of the court:

Pat Erickson, Kimberly La Deur, Joette M. Hager, and Kimberly S. Kolze (plaintiffs) brought this suit against the Board of Education, Proviso Township High School, District No. 209, Cook County, Illinois (defendant). Count I of plaintiff's complaint alleged a violation of the "Equal Pay Act", 29 U.S.C. 206(d) (1). Count II alleged discrimination against plaintiffs in violation of the Illinois Constitution of 1970, article I, section 18. The trial judge entered summary judgment for defendant. Plaintiffs appeal.

Defendant operates public high schools known as Proviso East and Proviso West. Plaintiffs acted as teachers and also as coaches of certain girls' athletic teams. It is the theory of plaintiffs that they were discriminated against as regards their compensation for coaching activities on the basis of the fact that they were women. The high schools operated by defendant also employed men as athletic coaches.

The record shows that the defendant has two separate bargaining agreements with the local teachers union of which plaintiffs are members. The scale of pay for teachers in connection with their work as athletic coaches was a matter of contract arrived at after negotiations. The collective bargaining agreements set out the coaching compensation in detail. One of the important matters here involved is that the collective bargaining agreements refer to "men coaches" and also to "women coaches." However, the record shows definitely, and the parties have conceded, that the contract schedule with reference to designations of "men" and "women" does not relate to or describe the coaches. On the contrary, these designations refer to the sex of student participants in athletics who receive coaching from plaintiffs. The coaching itself was such that in some instances male coaches assisted girls in their sports and in one situation a woman had served as coach of a gymnastics team for boys. Thus the compensation for the coaching was not set in accordance with the sex of the coach but rather pertained to the sex of the participants who received the coaching.

Discovery was had by both sides. Defendant's motion contains affidavits together with a statement of facts, copies of collective bargaining agreements and excerpts

from plaintiffs' depositions. Plaintiffs themselves did not file affidavits or depositions but simply a legal memorandum directed to the merits of the motion. It appears from the depositions of plaintiffs that some women coaches who worked with the boys' teams received a higher salary than men coaches who worked with the girls. The collective bargaining agreements contain information to this effect.

It is agreed that the Federal Equal Pay Act is applicable to the situation here. This statute provides (29 U.S.C. 206(d) (1)):

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

In addition a provision of the Illinois Constitution of 1970 is also applicable here. This provision states (Ill. Const. 1970, art. I, § 18):

> *"No Discrimination on the Basis of Sex.*
>
> "The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts."

It is the theory of plaintiffs that the record discloses various material issues of fact which set forth violations of the Equal Pay Act and of article I, section 18, of the Illinois Constitution of 1970. Thus, plaintiffs in effect contend the record shows there are genuine issues as to material facts so that the trial judge erred in granting summary judgment. (See Ill. Rev. Stat. 1981, ch. 110, par. 2-1005.) However, plaintiffs did not file a factual response to defendant's motion for summary judgment, to demonstrate the presence of any material and disputed facts. Plaintiffs attempted to rely upon the allegations of their complaint. The trial judge concluded that summary judgment for defendant was proper. In this regard, the law is clear that absent facts set out in a counteraffidavit, "[m]ere reliance upon contrary averments in the [opposing] party's answer is insufficient." *Burks Drywall, Inc. v. Washington Bank & Trust Co.* (1982), 110 Ill. App. 3d 569, 576, 442 N.E.2d 648, and cases there cited.

Neither party cites in their brief any legal authority which directly considers the rather unique situation here presented. It seems clear, as a factual matter, that the plaintiffs were not discriminated against because of their sex. As shown, the compensation to be given to athletic coaches did not vary with any particular coach but depended upon, and varied in accordance with, the sex of the pupils who received the coaching. Undoubtedly where there is a wage discrimination against women because of their sex, that situation is definitely covered by the Equal Pay Act. (See *Corning Glass Works v. Brennan* (1974), 417 U.S. 188, 41 L. Ed. 2d 1, 94 S.Ct. 2223; *Hodgson v. American Bank of Commerce* (5th Cir. 1971), 447 F.2d 416.) Similarly, article I, section 18, of the Illinois Con-

stitution of 1970 is directed at the same type of discrimination. This amendment has been applied by the courts of Illinois in a salutory effort to stamp out discrimination by governmental bodies of any kind based upon sex. See *People v. Ellis* (1974), 57 Ill. 2d 127, 311 N.E.2d 98.

The defendant cites a number of cases decided under Title VII of the Federal Civil Rights Act of 1964 (42 U.S.C. 2000e) which reads in part as follows:

> "It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of said individual's race, color, religion, sex or national origin. . . ."

As stated in this enactment, it was intended to eliminate not only discrimination on the basis of sex but discrimination of any other kind.

Although plaintiffs' case is not based upon Title VII, we see no reason why cases decided under this enactment are not applicable by analogy to the situation before us. Defendant cites two cases which, in our opinion, are thus applicable here. These decisions are factually very close to the instant case. They hold that there was no discrimination based on sex between the coaching services rendered to girls and those rendered to boys in athletic matters. These cases are *Jackson v. Armstrong School District* (W.D. Pa. 1977), 430 F.Supp. 1050; and *Kenneweg v. Hampton Township School District* (W.D. Pa. 1977), 438 F.Supp. 575.

In *Jackson,* plaintiffs were women who coached women's basketball teams. They complained that men who coached men's basketball teams received greater pay. The court there pointed out that there were a total of eight coaches in the school, four men and four women, all of whom coached women's basketball teams and all received the same pay for their services. (430 F.Supp. 1050, 1052.) Thus, the court held that there was no discrimination because of the sex of the coach but simply that a different scale of compensation was applied to services rendered in coaching boys to the services rendered in coaching girls.

Similarly, the court in *Kenneweg* had a situation before it in which two female coaches of girls' teams alleged that the school district had applied a higher pay scale for coaches of male sports than for female sports. The court cited *Jackson* and concluded that this disparity was not predicated upon sex discrimination against the plaintiffs, but that the record showed simply the application of a higher rate to all coaches who worked in male sports to those coaches who worked in female sports. 438 F.Supp. 575, 577.

As defendant points out, the reasoning applied in *Jackson* and *Kenneweg* was followed in rather similar situations which arose in New York State. *Kings Park Central School District No. 5 v. State Division of Human Rights* (1980), 74 A.D.2d 570, 424 N.Y.S. 2d 293; *State Division of Human Rights v. Syracuse City Teachers Association, Inc.* (1979), 66 A.D.2d 56, 412 N.Y.S.2d 711.

The same result was very recently reached by this court in connection with an alleged violation of article I, section 18 of the Illinois Constitution of 1970. (*Tran-*

quilli v. Irshad (1983), 117 Ill. App. 3d 1074, 454 N.E.2d 377.) This court there held (117 Ill. App. 3d 1074, 1076):

> "Sex discrimination is *gender* based.
>
> "The most fundamental requirement for a showing of sex discrimination is a demonstration that *men* and *women* were treated in a dissimilar manner because of their sex."

In the instant case, the plaintiffs herein have in fact received equal pay for the same coaching responsibilities and services. Thus any differential between male and female coaches is based on a factor "other than sex" precisely as stated in exception (iv) of the Equal Pay Act. 29 U.S.C. 206(d) (1) (iv).

We conclude that the trial court correctly found there was no material issue of disputed fact raised herein and defendant was entitled to summary judgment. The order appealed from is therefore affirmed.

Order affirmed.

BUCKLEY, P.J., and McGLOON, J., concur.

APPENDIX C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

April 3, 1984

Mr. George J. Anos
Ash, Anos, Freedman & Logan
77 W. Washington St., S#1211
Chicago, IL 60602

No. 59609—Pat Erickson, et al., petitioners, vs. Board of Education, Proviso Township High School, District No. 209, etc., respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 25, 1984.

APPENDIX D (1 of 7)

Pay Schedule For Athletic Coaches
1976-1978

D. DEVIATIONS

1. Special Service deviations shall be granted as follows:

   a. Athletic Coaches—Men and Women

Men Coaches	
Football	
Varsity	$1365.00
Ass't.	890.00
J.V.	890.00
Ass't.	840.00
Sophomore	890.00
Ass't.	840.00
Freshman	890.00
Ass't.	840.00
Trainer	840.00
Cross Country	
Varsity	1040.00
Fresh.-Soph.	890.00
Basketball	
Varsity	1365.00
Jr. Varsity	890.00
Sophomore	890.00
Freshman "A"	890.00
Freshman "B"	840.00
Gymnastics	
Varsity	1040.00
Sophomore	890.00
Freshman	890.00

APPENDIX D (2 of 7)

Swimming	
Varsity	$1040.00
Sophomore	890.00
Freshman	890.00
Wrestling	
Varsity	1040.00
Jr. Varsity	890.00
Sophomore	890.00
Freshman	890.00
Indoor-Outdoor Track	
Head	1365.00
Ass't.	1040.00
Winter Trainer	840.00
Baseball	
Varsity	1040.00
Jr. Varsity	890.00
Sophomore	890.00
Freshman "A"	890.00
Freshman "B"	840.00
Golf	
Varsity	1040.00
Fresh.-Soph.	890.00
Tennis	
Varsity	1040.00
Fresh.-Soph.	890.00
Spring Trainer	840.00
Soccer (Proviso West only)	
Head	1040.00
Ass't.	890.00

APPENDIX D (3 of 7)

Women Coaches

Tennis	$ 500.00
Basketball	500.00
Ass't.	425.00
Volleyball	500.00
Ass't.	425.00
Swimming	500.00
Gymnastics	500.00
Ass't.	425.00
Bowling	500.00
Track	500.00
Ass't.	425.00
Badminton	500.00
Softball	500.00
Ass't.	425.00
Field Hockey	500.00
Swim Show	550.00
Cheerleader Sponsor	500.00
Dance	600.00
Pirateers	500.00

b.	Sponsor of School Paper	$ 950.00
c.	Resource Specialist in Audio-Visual	850.00
d.	Sponsors of Debate and Forensics	900.00
	Assistant Sponsors	525.00
e.	Individual Events (divided)	1325.00
f.	Class Sponsors	
	Senior	425.00
	Junior	375.00
	Sophomore	375.00
	Freshman	225.00
g.	School Photographer	850.00
h.	Sponsors of Student Talent or Variety Show	525.00

APPENDIX D (4 of 7)

6. Recognition of graduate credit for professional growth requirements or hours beyond the Master's degree shall be recorded in semester hours with the proper quarter hour conversion ratio of two-thirds (⅔). College or university graduate credit shall be recorded provided:

1. One quarter hour represents approximately one fifty-minute period of classroom work each week for the duration of one quarter (10 weeks) or the equivalent in laboratory, workshops, fieldwork or independent study.

2. One semester hour represents approximately one fifty-minute period of classroom work each week for the duration of one semester (15 weeks) or the equivalent in laboratory, fieldwork, workshops, or independent study.

3. It is not in violation of other sections of this contract.

4. It is not course work taken by correspondence.

D. DEVIATIONS

1. Special Service deviations shall be granted as follows:

a. Athletic Coaches—Men and Women

Men Coaches	
Football	
Varsity	$1638.00
Ass't.	1068.00
J.V.	1068.00
Ass't.	1008.00
Sophomore	1068.00
Ass't.	1008.00
Freshman	1068.00
Ass't.	1008.00
Trainer	1008.00
Cross Country	
Varsity	1248.00
Fresh.-Soph.	1068.00

APPENDIX D (5 of 7)

Basketball	
Varsity	$1638.00
Jr. Varsity	1068.00
Sophomore	1068.00
Freshman "A"	1068.00
Freshman "B"	1008.00
Gymnastics	
Varsity	1248.00
Sophomore	1068.00
Freshman	1068.00
Swimming	
Varsity	1248.00
Sophomore	1068.00
Freshman	1068.00
Wrestling	
Varsity	1248.00
Jr. Varsity	1068.00
Sophomore	1068.00
Freshman	1068.00
Indoor-Outdoor Track	
Head	1638.00
Ass't.	1248.00
Winter Trainer	1008.00
Baseball	
Varsity	1248.00
Jr. Varsity	1068.00
Sophomore	1068.00
Freshman "A"	1068.00
Freshman "B"	1008.00
Golf	
Varsity	1248.00
Fresh-Soph.	1068.00

APPENDIX D (6 of 7)

Tennis

Varsity	$1248.00
Fresh-Soph.	1068.00
Spring Trainer	1008.00

Soccer (Proviso West only)

Head	1248.00
Ass't.	1068.00

Women Coaches

✓ Tennis	600.00
✓ Basketball	600.00
Ass't.	510.00
Volleyball	600.00
Ass't.	510.00
✓ Swimming	600.00
✓ Gymnastics	600.00
Ass't.	510.00
Bowling	600.00
✓ Track	600.00
Ass't.	510.00
Badminton	600.00
Softball	600.00
Ass't.	510.00
Field Hockey	600.00
Swim Show	660.00
Cheerleader Sponsor	600.00
Dance	720.00
Pirateers	600.00

b.	Sponsor of School Paper	$1140.00
c.	Resource Specialist in Audio-Visual	1020.00

APPENDIX D (7 of 7)

d.	Sponsors of Debate and Forensics	$1080.00
	Assistant Sponsors	630.00
e.	Individual Events (divided)	1590.00
f.	Class Sponsors	
	Senior	510.00
	Junior	450.00
	Sophomore	450.00
	Freshman	270.00
g.	School Photographer	1020.00
h.	Sponsors of Student Talent or Variety Show	630.00
i.	Plays and Musical Productions	
	Fall Play Director	630.00
	Technical Director	450.00
	Spring Play Director	630.00
	Technical Director	450.00
	Contest Play Director	390.00
	Readers Theatre	275.00
j.	Music Directors	
	Band	600.00
	Stage Band	360.00
	Madrigal Director	300.00
k.	Sponsor of Yearbook	1080.00
l.	Sponsor of Student Council	1020.00
m.	Extra Class	1650.00
n.	Chairman of Commencement Program	570.00

2. For such special assignments as ticket-taking, ushering, ticket-selling, concessions, supervision, photographing, judging debates, summer educational projects, and enrichment course instruction, there shall be additional compensation as determined by the Board of Education.

3. a. Regular teachers assigned as substitutes shall be paid at a rate of $8.50 an hour with the following exceptions:

b. Teachers who teach a double class shall be paid at the rate of $6.00 per hour.

No. 83-1853

In the

Supreme Court of the United States

OCTOBER TERM, 1983

PAT ERICKSON, KIMBERLY LA DEUR, JOETTE M. HAGER, and KIMBERLY S. KOLZE,

Petitioners,

vs.

BOARD OF EDUCATION, PROVISO TOWNSHIP HIGH SCHOOL DISTRICT NO. 209, COOK COUNTY, ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

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31pp

TABLE OF CONTENTS

TABLE OF CASES

TREATISES

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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Petitioners,

vs.

BOARD OF EDUCATION, PROVISO TOWNSHIP HIGH SCHOOL DISTRICT NO. 209, COOK COUNTY, ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

STATEMENT OF THE CASE

Petitioners' statement of the case misstates the facts in furtherance of a so-called "tokenism" theory that finds absolutely no support in the Record.[1] It is accordingly necessary for Respondent to expand somewhat upon the

---

[1] Petitioners' Statement does nothing more than parrot the allegations of their Complaint while ignoring the facts that developed during discovery. See Appendix hereto.

summary of the undisputed facts that are set forth in the Illinois Appellate Court's Opinion to accurately state the nature of this action.

Respondent operates two public high schools, Proviso East and Proviso West. Petitioners are present (Erickson) or former (LaDeur, Hager and Kolze) teachers at Proviso West who, in addition to teaching, also served as coaches of some of the girls' athletic teams. Erickson was the head girls' tennis coach at Proviso West, Kolze coached a variety of girls' sports, LaDeur coached the girls' swimming and track teams, and Hager coached the girls' volleyball, tennis and gymnastics teams. Petitioners' challenge relates to the pay received by them in their coaching assignments for the period from August 1977, to October 1979.

The incremental pay for those teachers who also serve as athletic coaches is determined through the collective bargaining process. During 1977-79, the District had two separate collective bargaining agreements with the local teachers' union. Among the matters negotiated by the parties under the agreement are the salaries received by the teachers who serve as athletic coaches (the salary increments are referred to in the agreements as "deviations"). Contrary to the assertions in the Petition, the pay schedules for athletic coaches is not a "policy" unilaterally thrust upon the petitioners and their fellow faculty members by the respondent. Rather, they are provisions of collective bargaining agreements.

Although the coaching salary schedules in the agreements refer to "men coaches" and "women coaches," petitioners' and their attorneys have acknowledged that the schedule relates not to the sex of the coaches, but to the

sex of the student athletic participants. For example, during the 1976-78 school years, the boys' varsity gymnastics coach (man or woman) would receive an additional $1,040 for his or her coaching duties. The girls' varsity gymnastics coach (man or woman) would receive $500 (Petition at App. 10-12).

It is undisputed that during the years in question there were numerous men who served as either the head coach or the assistant coach of a particular girls' team, all of whom received the (lower) girls' coaching increment. The individual petitioners acknowledged in their depositions that they were aware of at least seven men who coached girls' sports at Proviso East or Proviso West during the years in question and who received the lower increment. In addition, there was at least one woman during this period who has served as a coach of the boys' gymnastics team and who has received the higher increment. Most importantly, at no time were there any barriers to entry—respondent did not restrict applications for coaching positions to one sex or another and men and women were free to apply for any coaching position. There is nothing in the Record to show that respondent's hiring practices reflect only "isolated instances of token equality. . . . ." (Petition at 6). There is no evidence in the Record which would even arguably lend support to the theory now being advanced by petitioners; i.e., that respondent occasionally arranged for men to coach girls' sports and vice versa in order to mask its "generally discriminatory employment practices." (Petition at 6).

Indeed, petitioners do not claim that they, or women generally, were denied the opportunity to coach boys' sports at respondent's schools. They do not claim that there were any barriers to entry into any of the coaching

positions. The key allegation of their Complaint is Paragraph 4:

> *Coaches for both boys' and girls' teams* practiced approximately the same number of hours per day and days per week; both had approximately the same number of meets per season; both had approximately the same number of road games; and both had approximately the same number of members. (emphasis added.)
>
> Respondent's Appendix at 2a.

In focusing on the similarities between coaching duties, the Complaint itself looks to the sex of the student athletes as the basis of the classification. Petitioners do not allege that women were being discriminated against—only that the coaches of the "girls' teams," men and women alike, were being disadvantaged in comparison to the coaches of the boys' teams, men and women alike.

The petitioners filed their Complaint on October 3, 1980. Respondent answered the Complaint, supplied Answers to Interrogatories, and deposed the individual petitioners. Respondent also furnished various materials to petitioners in response to their production request. On November 6, 1981, Respondent filed its Motion for Summary Judgment, relying on the various undisputed facts set forth above.

Petitioners filed no affidavits, depositions, or any other competent summary judgment materials in opposition to the Motion, choosing to rest on a legal Memorandum in opposition to the Motion.

The trial court heard oral arguments on January 27, 1982 and April 21, 1982. Following that second hearing, the court granted the respondent's Motion. On May 21, 1982, petitioners filed a Petition for Rehearing. Follow-

ing an additional round of briefing and further oral arguments on November 12, 1982, and March 10, 1983, the court granted the Petition for Rehearing but denied plaintiffs' Motion to Vacate the earlier Summary Judgment Order. The Illinois Appellate Court affirmed the trial court on December 12, 1983, 120 Ill. App. 3d 264, 458 N.E.2d 84, and the Illinois Supreme Court denied the Petition for Leave to Appeal on April 3, 1984. At no time during any of these hearings or proceedings did petitioners submit any competent evidentiary materials in opposition to respondent's Motion for Summary Judgment. There is simply nothing in the Record to support petitioners' newly-articulated "token job placement" theory.

ARGUMENT

I. PETITIONERS WERE NOT DISCRIMINATED AGAINST ON THE BASIS OF THEIR SEX.

This appeal presents a narrow legal issue that has been decided by a number of courts. The petitioners are charging that the Respondent discriminated against petitioners on the basis of their sex by paying them for their coaching assignments pursuant to the schedule appearing in the collective bargaining agreements. As set forth more thoroughly hereinbelow, the Appellate Court correctly held that under any antidiscrimination law, be it the Equal Pay Act, the Civil Rights Act of 1964, the Illinois Constitution, or the Equal Protection Clause, in order for petitioners to be entitled to any relief, they must show that they were discriminated against *on the basis of their own sex.*[2]

Simply stated, in order for there to be sex discrimination, the government's classification must be based upon the sex of the person against whom the classification operates. In *Reed* v. *Reed,* 404 U.S. 71, 75 (1971), this Court noted that only when legislation "provides that different treatment be accorded to the applicants on the basis of *their* sex . . . it thus establishes a classification subject to scrutiny under the Equal Protection Clause." *Id.* (emphasis added) In *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), the Court held that an otherwise comprehensive disability insurance program that excluded pregnancy

[2] Contrary to the indication of p. 3 of the Petition, Petitioners had made no 14th Amendment claims. 120 Ill. App. 3d 264, 458 N.E.2d 84 (1983).

coverage was not sexually discriminatory because of the "lack of identity between the excluded disability and gender as such. . . . *Id.* at 497 n.20.

Petitioners miss this elemental point. Respondent has assumed for summary judgment purposes that the coaches of girls' sports (men and women alike) were doing more work and making less money. That alleged contractual inequity does not become sex discrimination because the classification is not based upon the sex of the coaches. As the Appellate Court found, it is undisputed that "compensation for the coaching was not set in accordance with the sex of the coach, but rather pertained to the sex of the participant who received the coaching." Petition, App. 3, 120 Ill. App. 3d at 266, 458 N.E.2d at 85. Therefore, the trial court was correct when it granted summary judgment to the Board.

Although there are no cases on point interpreting the Equal Pay Act, there have been two federal and two New York cases with identical facts interpreting Title VII and an analogous state antidiscrimination law where the courts have ruled that there was no sex discrimination in this type of coaching pay differential. Petition, App. 6-7. The reasoning of these opinions may be helpful to this Court's analysis.

In *Jackson* v. *Armstrong School District*, 430 F. Supp. 1050 (W.D. Pa. 1977), the court accepted, for purposes of the Motion to Dismiss filed by the school district, the claim that female plaintiffs who coached women athletes were doing more but were getting paid less than males who coached men:

> In form that is arguably discrimination in employment based on sex; in substance that is not a valid

claim under Title VII for the simple reason that the disparity in treatment is not based on *plaintiffs'* sex. *Id.* at 1052 (emphasis in original).

After reviewing the applicable language of Title VII (42 U.S.C. §2000e 2(a)(1)), and emphasizing that discrimination requires that there be differential treatment based upon claimants' sex, the court held:

> Because plaintiffs are faced with a situation—male coaches of women's basketball being paid the exact same amount as female coaches of women's basketball—that really cannot be squared with a charge of discrimination *based on sex,* they apparently seek to satisfy that element of the claim by relying on the sex of the sports participants.
>
> It is clear from the statute that the sex of the claimants must be the basis of the discriminatory conduct. Here plaintiffs are not discriminated against because of *their* sex. They are treated equally with the men who coach women's basketball. Allowing their claim, as stated, to stand would not only emasculate the statutory language but would embrace a construction that renders the sex of the employee immaterial to the claim. Following their argument further the male coaches of women's basketball would be free to lodge the same charge. In turn we envision the anomalous situation of the school district, which shows no sexual preference toward women's basketball coaches, being sued for discriminatory practices. This is not what Title VII says nor contemplates. It was designed to curb discriminatory practices committed against certain classes—e.g., sex, race, or ethnic derivation—of *employees* with the idealistic goal of engendering parity for all. 430 F. Supp. at 1052 (emphasis in original).

Plaintiffs do not charge that they were denied men's basketball coaching positions because they are

> women. Rather plaintiffs contend that they are denied higher wages and better working conditions because they *coach* women. While their case may be cited as an example of unfairness in employment it is not built to dimensions compatible with the statutory scheme. 430 F. Supp. at 1052 (emphasis in original).

The *Jackson* case was followed and approved in *Kenneweg* v. *Hampton Township School District,* 438 F. Supp. 575 (W.D. Pa. 1977). In *Kenneweg,* two female coaches of a high school girls' basketball and girls' volleyball teams alleged that the district discriminated against them in violation of Title VII because "the defendant school district has used a higher pay scale for coaches of male sports than for coaches of female sports. . . ." *Id.* at 576.

As in *Jackson,* the *Kenneweg* court dismissed the complaint, stating:

> It is clear from the statute that the sex of the plaintiffs must be the basis of the discriminatory conduct. . . . [D]isparity in treatment not based on plaintiffs' sex is not a valid claim under Title VII [citation]. If plaintiffs coaching female sports are being paid less than individuals coaching male sports, there is no valid claim of gender based discrimination as to these plaintiffs. Here plaintiffs are not being discriminated against because of *their* sex. *Id.* at 577 (emphasis in original).

In this case, the female plaintiffs are coaches of girls' sports and receive less than those individuals coaching boys' sports. As in *Jackson, all* of the coaches of girls' sports at Proviso West High School—men and women alike—were paid the lesser amount. Indeed, the facts in this case are even more compelling, since it is undisputed

that there are no barriers which would prevent women from coaching the boys' sports and receiving the higher increments. In fact, at least one woman has coached a boys' sport and received the higher pay that all coaches of boys' sports receive.

The reasoning of *Jackson* and *Kenneweg* was followed in a pair of New York cases. In *State Division of Human Rights* v. *Syracuse City Teachers' Association and Board of Education of Syracuse City School District,* 66 A.D.2d 56, 412 N.Y.S.2d 711 (1979), two female coaches of girls' sports challenged practices of the Board of Education and provisions of a collective bargaining agreement dealing with compensation for athletic coaches. As in this case, the Appellate Division found that no discrimination had occurred.

Dealing first with the issue of the Board of Education's policy prior to the effective date of the applicable collective bargaining agreements, the court rejected plaintiffs' claim, citing *Kenneweg* and *Jackson,* and finding that "indeed, to award complainants' compensation in this case would produce the incongruous result of discriminating against the males who coach the girls' track and gymnastics teams." 66 A.D.2d at 60-61, 412 N.Y.S.2d at 714. More importantly, the court reviewed the charge that the collective bargaining agreement pay schedule was discriminatory because it "expressly differentiated in pay scales between coaches of girls' and boys' teams." 66 A.D.2d at 58, 412 N.Y.S.2d at 713. The court held that the schedule was not discriminatory, stating:

> The pay established becomes discriminatory, however, only if two premises are assumed: first, that the job of coaching a boys' team and coaching a girls'

team are the same, and second, that only females coach girls' teams and only males coach boys' teams. There is no evidence in the record that this is true. . . .

Furthermore, although it may be presumed that the coaches of boys' teams will normally be male, and the coaches of girls' teams will normally be female, there was no evidence that any rule or practice of petitioners mandated such an arrangement, and there was evidence that in at least two instances in 1968, teachers of one sex coached athletic teams of the other sex. *Id.* at 62-3.

In *Kings Park Central School District No. 5* v. *State Division of Human Rights,* 74 A.D.2d 570, 424 N.Y.S.2d 293 (1980), a similar challenge was made to a coaching salary discrepancy. The court found that the discrepancies were justified by differing coaching duties. The court went on to emphasize that "[m]oreover, there has been no showing that the complainants have been barred from earning greater stipends by any rule or regulation prohibiting them from coaching a boys' team." 74 A.D.2d at 572, 424 N.Y.S.2d at 296.

The *Syracuse City School District* case posited a two-part test which an employee must overcome to state a claim. Female coaches of girls' sports must show:

(1) that the job of coaching a boys' team and coaching a girls' team are the same; and

(2) that only females coached girls' teams and only males coached boys' teams. 66 A.D.2d at 62, 412 N.Y.S.2d at 715.

Under the *Syracuse* formulation, Respondent has assumed that petitioners can clear the first hurdle. However, the Record is undisputed that they cannot clear the second

hurdle, since many males have coached the girls' sports teams, at least one female has coached the boys' team, and there are no barriers to entry. Under these cases, then, the District's "gender-neutral labor agreement," 74 A.D.2d at 572, 424 N.Y.S.2d at 296, does not discriminate against the female coaches of the girls' sports on the basis of their sex.

The Appellate Court was correct in endorsing the reasoning of these cases and holding that "we see no reason why cases decided under [Title VII and the analogous New York law] are not applicable by analogy to the situation before us." 120 Ill. App. 3d 264, 267, 458 N.E.2d 84, 86 (1983) The Equal Pay Act prohibits discrimination between employees on the basis of their sex, *City of Los Angeles Dept. of Water* v. *Manhart,* 435 U.S. 702, 712-13 n.24 (1978); and in this case, there is no discrimination on that basis. In addition, even assuming that plaintiffs could make out a prima facie case, the respondent is still not liable because the "differential [is] based on . . . [a] factor other than sex. . . ." 29 U.S.C. §206(b)(1)(iv).

Here, the collective bargaining agreement has established two classifications of coaches—men and women who coach the boys' sports, and men and women who coach the girls' sports. Men and women are free to apply for and coach all sports. And, notwithstanding petitioners' unsupported claims of "tokenism," there is nothing in the Record to suggest that the coaching salary schedules and the respondent's actions thereunder "are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other. . . ." *Geduldig*

v. *Aiello,* 417 U.S. 484, 496 (1974) n.20.[4] *See also General Electric Co.* v. *Gilbert,* 429 U.S. 125, 145-146 (1976) disability insurance plan does not violate Title VII because it fails to cover pregnancy-related disabilities). This case is thus a "far cry" from those cases dealing with classifications based on gender itself. *Geduldig* at 496 n. 20. The distinction in the coaching salary differential is based on a factor other than the sex of the coaches; *i.e.,* the sex of the student participants. The Appellate Court was correct in so holding. 120 Ill. App. 3d 264, 268, 458 N.E.2d 84, 86-87 (1983)

The cases principally relied upon by petitioners further illustrate the correctness of the Appellate Court's decision and show that in order for a classification of employees to be discriminatory, it must be based on the employees' own sex. *Corning Glass Works* v. *Brennan,* 417 U.S. 188, 190-195 (1974), presents a clear fact situation where a wage differential was based solely on the sex of the employee. Prior to 1925, the company's plant operated only during the day and only women performed inspection work. A few years later, the company instituted a night shift, but because of local laws, only men could work as inspectors during those hours. The men demanded and received higher wages for the night shift work, even though the duties were identical.

Following the enactment of the Equal Pay Act, the company allowed women to work as night shift inspectors, but a subsequent collective bargaining agreement

---

[4] The Appellate Court in this case pointed out that petitioners failed to offer a single piece of evidence on their "tokenism" theory in response to the respondent's Motion for Summary Judgment. 120 Ill. App. 3d 264, 266, 458 N.E.2d 84, 85 (1983).

perpetuated the past shift differential between the wages paid to day and night inspectors. *Id.* at 193-94. This Court held that the maintenance of the shift differential violated the Equal Pay Act, because "men would not work at the lower rates paid women inspertors. . . ." *Id.* at 205. And since the shift differential was based solely on the fact of the employees' sex, it was violative of the Act. The Court clearly indicated, however, that if the shift differential had been based on some factor other than the employees' sex, it would not have been in violation. *Id.* at 203-05.

Thus, the key to the *Corning Works* opinion is that the wage differential resulted from the fact that only men were allowed to serve as night shift inspectors, and a group composed solely of workers of one sex received higher wages than the second group consisting solely of workers of the other sex. Precisely the opposite is true in this case. Both men and women are eligible to serve as coaches of the respective boys' and girls' athletic teams at the high schools. The salary differential is, therefore, not based solely on the sex of the employees.

Similarly, *Hodgson* v. *American Bank of Commerce,* 447 F.2d 416 (5th Cir. 1971), is also inapplicable. In that case, the court simply held that the fact that two women bank tellers, who had nine years more experience than two male tellers, were making slightly more than the males did not establish that there was no prohibited sex discrimination between the wages paid to men as a group and those paid to women as a group. *Id.* at 421. *Hodgson* did not involve facts such as those present in this case, where there are two separate classifications of employees,

and where men and women freely are able to obtain coaching positions for either the boys' or the girls' sports. The Appellate Court correctly found that these two cases were not controlling. 120 Ill. App. 3d 264, 266, 458 N.E.2d 84, 86, (1983)

II. TITLE VII AND THE EQUAL PAY ACT SHARE A COMMON ROOT. IF AN EMPLOYMENT PRACTICE DOES NOT VIOLATE TITLE VII, IT DOES NOT VIOLATE THE EQUAL PAY ACT.

Petitioners never dispute the reasoning of the decisions cited by the Appellate Court and their similarity to the present facts. Instead, the only basis upon which they now seek to distinguish them is by arguing (at 14-15) that they involved alleged violations of other laws "and have nothing to do with the Equal Pay Act" (Petition at 14). The only "substantial authority" in support of this contention that the statutory distinction makes any real analytical difference is an article appearing in the Harvard Women's Law Journal. Dessem, *Sex Discrimination in Coaching,* 3 HARV. WOMEN'S L.J. 97 (1980). There, the author seeks to distinguish *Jackson* and *Kenneweg* by arguing that while Title VII prohibits discrimination against a person "because of such individual's . . . sex," the Equal Pay Act prohibits wage discrimination only "between employees on the basis of sex" without using the phrase "such individual's". 3 HARV. WOMEN'S L.J. 97, 110-11. The Equal Pay Act, the argument goes, is therefore a broader provision than Title VII.

This reasoning is not only specious, it also ignores the thrust of the relevant statutes and various decisions of this Court.

The Equal Pay Act was enacted in 1963 and was designed to resolve the problems "of employment discrimination in private industry. . . ." *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974). The Act provides that no employer shall "discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which it pays wages to employees of the opposite sex . . . for equal work. . . ." 29 U.S.C. §206(d)(1). The Act also establishes four exceptions where different wages may be paid to employees of the opposite sex pursuant to a seniority system, a merit system, a system measuring earnings by quantity or quality of production, and "a general catch-all provision." *Corning Glass Works* v. Brennan, 417 U.S. 188, 195-96 (1974).

The following year, Congress enacted the more comprehensive Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. Title VII provides in applicable part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of said individual's race, color, religion, sex or national origin. . . .
>
> 42 U.S.C. §2000e-2(a)

As this Court noted:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only over discrimination but also practices that are fair in form, but discriminatory in operation." [Citation]. *County of Washington* v. *Gunther*, 452 U.S. 161, 170 (1981).

A provision of Title VII, 42 U.S.C. §2000e-2(h), specifically provides that a wage structure is not violative of Title VII if a differentiation is authorized by one of the exceptions found in the Equal Pay Act (the Bennett Amendment). The Court in *County of Washington* held that a wage structure not violative of the Equal Pay Act could still violate Title VII if the wages of women were depressed due to intentional sex discrimination, even though women were not doing equal work in comparison to men. *Id.* at 167-171.

Thus, it can be seen that Title VII is a broader remedial act designed to cover the entire spectrum of the employer/employee relationship, not simply the matter of wages paid:

> In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. *Los Angeles Department of Water and Power* v. *Manhart,* 435 U.S. 702, 707 (1978) n.13 (quoting *Sprogis* v. *United Air Lines, Inc.,* 444 F.2d 1194, 1198 (7th Cir. 1971)).

The Equal Pay Act has been incorporated into Title VII. *Arizona Governing Committee* v. *Norris,* ..... U.S. ....., 103 S. Ct. 3492, 3496 n.8 (1983) (Marshall, J., *concurring*). Given the broader scope on Title VII, and under the *County of Washington* case, an employer could be liable for a Title VII violation where he otherwise would not be liable under the Equal Pay Act. Conversely, if a practice is found to fall outside the broader remedial not of Title VII, it necessarily follows that the practice cannot be violative of the Equal

Pay Act. *Orahood* v. *Board of Trustees,* 645 F.2d 651, 654 n.3 (8th Cir. 1981). Numerous cases have held that "in examining a sex discrimination case involving unequal compensation, Title VII and the Equal Pay Act must be construed in harmony." *Orahood* v. *Board of Trustees,* 645 F.2d 651, 654 (8th Cir. 1981), *Walter* v. *KFGO Radio,* 418 F. Supp. 1309, 1316 (D. N.D. 1981); *see also DiSalvo* v. *Chamber of Commerce,* 568 F.2d 593 (8th Cir. 1978). When a "plaintiff has brought suit under the Equal Pay Act as well as Title VII, [a court's] basic analysis is essentially the same under either theory." *Strecker* v. *Grand Forks City Social Service Board,* 640 F.2d 96, 99 (8th Cir. 1980).

Given the relationship between the Equal Pay Act and Title VII, cases under the latter enactment are persuasive authority (as the Appellate Court found) in determining whether the present Collective Bargaining Agreement violates the Equal Pay Act. 120 Ill. App. 3d 264, 266-68, 457 N.E.2d 84, 86 (1983). The distinction that petitioners attempt to raise concerning the statutory underpinnings of those cases relied upon by the Appellate Court is one without a difference.

It is moreover evident from its history and language that the Equal Pay Act is concerned with discrimination between men and women employees on the basis of *their* sex rather than with the concept of sex in gross. The only reasonable way to read the Act is that an employer shall not "discriminate . . . between employees on the basis of [their] sex. . . ." Indeed, Title VII's language makes explicit what is implicit in the Equal Pay Act. Title VII prohibits discrimination against a person "because of such individual's . . . sex. . . ."

This Court has recognized that the Equal Pay Act refers to the sex of the employees rather than some generalized reference to sex. In *City of Los Angeles, Department of Water* v. *Manhart*, 435 U.S. 702 (1978), the Court discussed the Equal Pay Act and found that the fourth exception was not available to the employer there because "the record contains no evidence that any factor other than the *employee's sex* was taken into account in calculating the . . . differential between the respective contributions by men and women. . . . *Id.* at 712. (emphasis added). [Defendant's] contribution schedule distinguished . . . between male and female employees." *Id.* at 713 n.24. The *Manhart* Court also emphasized that there is an Equal Pay Act violation if "the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *Id.* at 711. Thus, Title VII's definitional language clearly applies to Equal Pay Act cases.

Petitioners fail to come to grips with the elemental distinction pointed out by these cases—that in order for a person to have a claim for sex discrimination, the discrimination must be based on the claimant's own sex (the *Manhart* "but for" test). Instead, they are improperly attempting to utilize a classification based on the sex of the participants to prove discrimination based upon a nonexistent classification of the coaches.

A simple hypothetical will demonstrate the fallacy of plaintiffs' position. Assume, for example, that the Collective Bargaining Agreement provided that all English teachers at Proviso East receive $30,000 per year, while the English teachers at Proviso West would

receive $20,000 per year. Assume further that the duties of the respective English teachers are the same at both schools, and further that there are men and women teaching English at both schools.

Is this a proper subject for a collective bargaining grievance? Perhaps. Is it a proper subject for a sex discrimination claim filed by the female English teachers at Proviso West High School? Clearly not, because both men and women are being treated identically in each classification; the men and women English teachers at Proviso West High School are being equally disadvantaged in relation to the men and women English teachers in the higher paying classification at Proviso East. While there may be unfair treatment, it is not sex discrimination, because the District's pay classification is not based on the sex of the employees. The men and women English teachers at Proviso West are being treated alike in relation to each other, just as they are being treated alike in relation to the English teachers at Proviso East.

The undisputed facts in this case are precisely the same. All of the coaches of girls' sports—men and women alike—are being treated identically in relation to one another, just as they are being treated the same, *vis a vis* the coaches of the boys' sports. Thus, the facts in this case do not amount to discrimination on the basis of the coaches' sex.

The results urged by petitioners in this case would lead to an absurdity. If a court were to order an increase in the salaries of the female coaches of the girls' sports, such order would result in the *men* coaches of the girls' sports being discriminated against in relation

to their female counterparts. These men would jump right in, allege sex discrimination, and demand that their coaching stipends be increased. Petitioners' construction of the Equal Pay Act would render the sex of the employee immaterial to the claim. The ultimate result would not be the redress of sex discrimination, but the renegotiation of a collective bargaining agreement.

The employees who were allegedly disadvantaged by the District's coaching differential are not limited to a particular race, color, religion or sex. Like Title VII, the Equal Pay Act was designed to remove employment barriers "which operate to favor one group of employees *identifiable* by race, color, religion, sex or national origin." *Alexander* v. *Gardner-Denver Company,* 415 U.S. 36 (1974) (emphasis added.) Whatever barriers existed in the District's coaching salary structure, they did not favor or disfavor one group of employees identifiable by sex. Men and women were equally advantaged or disadvantaged under the classifications, and, accordingly, no sex discrimination claims lie under such circumstances.

The *sine qua non* of a sex discrimination claim is a classification based on the claimant's sex. In this case, the classification that petitioners are challenging is not based on their sex but is instead, as in *Jackson, Kenneweg* and the New York cases, based on the sex of the participants in the athletic programs. Accordingly, the predicate for any sex discrimination claim is missing.

V. CONCLUSION

The undisputed facts establish that this is not a case where the respondent only "occasionally" allowed women to coach male athletes and vice versa as some sinister exercise in "mere tokenism." The relevant collective bargaining agreements established two separate coaching classifications—one for the men and women who coach the girls' sports, and one for the men and women who coach the boys' sports. The men and women in each classification were similarly situated, both with respect to one another and with respect to the coaches of the other sports. While the coaching differential may or may not have furnished a basis for a collective bargaining grievance filed on behalf of *all* coaches of girls' sports at Proviso West High School, it clearly does not furnish the basis for a sex discrimination lawsuit by petitioners.

The Appellate Court's holding in this case is straightforward. While this is a case of first impression in Illinois, the question has been settled in decision after decision throughout the country. These decisions are sound, and the Appellate Court's ruling carefully and correctly follows the course charted by these decisions as well as decisions of this Court.

None of the factors which guide this Court's discretion under Rule 17 is present here. There are no unsettled questions of federal law at issue here, nor does this decision conflict with any applicable decisions of this Court. Accordingly, there are no special and important reasons for this Court to review this decision.

Respondent Board of Education of Proviso Township High School District No. 209, Cook County, Illinois, re-

spectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS, COUNTY DEPARTMENT,
LAW DIVISION

PAT ERICKSON, KIMBERLY LA DEUR
JOETTE M. HAGER, and KIMBERLY S. KOLZE,
Plaintiffs,

vs.

BOARD OF EDUCATION PROVISO TOWNSHIP
HIGH SCHOOL DISTRICT NO. 209,
COOK COUNTY, ILLINOIS,
Defendant.

No. 80L23362

COMPLAINT AT LAW

NOW COME the Plaintiffs, PAT ERICKSON, KIMBERLY LA DEUR, JOETTE M. HAGER, and KIMBERLY S. KOLZE, by their Attorneys, GEORGE J. ANOS and DENNIS L. HUDSON, and complaining of the Defendant, BOARD OF EDUCATION PROVISO TOWNSHIP HIGH SCHOOL DISTRICT NO. 209, COOK COUNTY, ILLINOIS, (hereinafter referred to as "BOARD OF EDUCATION") allege that:

COUNT I

1. That the cause of action under Count I is brought pursuant to 29 U.S.C. Section 206 (d). The Court has jurisdiction of the parties and the subject matter of this

cause of action pursuant to 29 U.S.C. Section 216 (b), commonly known as "The Equal Pay Act".

2. The Defendant, BOARD OF EDUCATION, is located in Cook County, Illinois, and operates a secondary school which had employees subject to the provisions of Section 6 of the Fair Labor Standards Act (29 U.S.C., Section 206) during the period of August, 1977, to October of 1979, during which time the Plaintiffs were employed.

3. The Plaintiffs, PAT ERICKSON, KIMBERLY LA DEUR, JOETTE M. HAGER, and KIMBERLY S. KOLZE, were employed by the Defendant as athletic coaches during the period of August, 1977 to October of 1979. Plaintiffs' duties consisted of recruiting teams, supervision and instruction of practice, travel, when necessary, attendance at team games, supervision and accounting for equipment and uniforms, and arrangement of schedules of practice, play and transportation.

4. That during the period of August, 1977 to October of 1979, Defendant paid Plaintiffs at a rate less than Defendant paid to employees of the male sex, although the jobs performed by Plaintiffs required equal skill, effort, and responsibility, and were performed under similar working conditions. Coaches for both the boys and girls teams practice approximately the same number of hours per day and days per week; both had approximately the same number of meets per season; both had approximately the same number of road games; and both had approximately the same number of members.

5. Moreover, the difference in the rates paid to male employees, as aforesaid, was not a part of, and was not occasioned by, any seniority, merit, or piece work system, but was based solely on the factor of sex.

6. Plaintiff, PAT ERICKSON, brought the aforesaid discriminatory practices to the attention of the BOARD OF EDUCATION at a formal meeting of the BOARD OF EDUCATION prior to the institution of this suit.

Despite these efforts on the part of Plaintiffs, the BOARD OF EDUCATION, with full knowledge of the discriminatory practice, continued to act in the aforesaid manner, which acts on the part of the Defendant, BOARD OF EDUCATION, amount to wilfull and wanton conduct.

WHEREFORE, the Plaintiffs, PAT ERICKSON, KIMBERLY LA DEUR, JOETTE M. HAGER and KIMBERLY S. KOLZE, pray as follows:

A. For Judgment in favor of Plaintiffs against Defendant in the sum of SIX THOUSAND FIVE HUNDRED TWENTY SIX DOLLARS ($6,526.00) for unpaid wages pursuant to 29 U.S.C. Section 216 (b) and for the additional sum of SIX THOUSAND FIVE HUNDRED TWENTY SIX DOLLARS ($6,526.00) as liquidated damages pursuant to 29 U.S.C. Section 216 (b), or for a total Judgment in the amount of THIRTEEN THOUSAND FIFTY TWO DOLLARS ($13,052.00).

B. For the specific judgment in favor of each Plaintiff to be determined by the Court.

C. For such further and other relief as this Court shall find equitable and proper.

COUNT II

1. Plaintiffs, PAT ERICKSON, KIMBERLY LA DEUR, JOETTE M. HAGER, and KIMBERLY S. KOLZE, are female citizens of the United States and the State of Illinois and reside in the State of Illinois.

2. Defendant, BOARD OF EDUCATION, is a unit of the Proviso Township High School District No. 209.

3. Plaintiffs, PAT ERICKSON, KIMBERLY LA DEUR, JOETTE M. HAGER, and KIMBERLY S. KOLZE, were employed by the Defendant as athletic coaches during the period of August, 1976 through October of 1979.

4. That during said period of time, Defendant paid Plaintiffs at a rate less than Defendant paid to employees

of the male sex. The jobs performed by both coaches required equal skill, effort, and responsibility, and were performed under similar working conditions. Coaches for both the girls and boys teams practiced approximately the same number of hours per day and days per week; both had approximately the same number of meets per season; both had approximately the same number of road games; and both had approximately the same number of members.

5. That the difference in the rates paid to male employees as aforesaid was based solely on the factor of sex.

6. That Defendant's aforesaid pay policy, which places a female coach on a lesser pay scale than a male coach, is unreasonable, arbitrary and capricious. The BOARD OF EDUCATION has no compelling interest in maintaining the aforesaid policy, and therefore, denies Plaintiffs equal protection of the laws, and discriminates against the Plaintiffs on the basis of sex in violation of the Illinois Constitution, Act I, Section 18, (State Equal Rights Amendment).

7. That Plaintiff, PAT ERICKSON, brought the aforesaid discriminatory practices to the attention of the BOARD OF EDUCATION at a formal meeting of the BOARD OF EDUCATION prior to the institution of this suit. Despite these efforts on the part of the Plaintiffs, the Defendant, with full knowledge of the discriminatory practice, continued to act in the aforesaid manner, amounting to wilfull and wanton conduct.

WHEREFORE, the Plaintiffs, PAT ERICKSON, KIMBERLY LA DUER, JOETTE M. HAGER, and KIMBERLY S. KOLZE, pray for Judgment in favor of the Plaintiffs and against the Defendant in the sum of TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00).

PAT ERICKSON, KIMBERLY LA DEUR,
JOETTE M. HAGER and KIMBERLY S. KOLZE

By: GEORGE J. ANOS and DENNIS L. HUDSON